

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

In the Matter of	)	
	)	
Jurisdictional Separations Reform	)	CC Docket No. 80-286
and Referral to the Federal-State	)	
Joint Board	)	

**COMMENTS OF QWEST CORPORATION**

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## SUMMARY

Almost three years ago the Federal Communications Commission (“Commission”) requested comments from interested parties as to changes that may be needed in its Part 36 jurisdictional separations rules. In response to this request, Qwest Corporation (“Qwest,” formerly U S WEST Communications, Inc.) filed comments expressing its concern over the unnecessary complexity of the separations rules and urged the Commission to dramatically reform these rules. Today the separations rules remain unchanged from those in effect three years ago. It is clear that dramatic separations reform will take longer than Qwest had anticipated. It is also evident that an intermediate step is necessary to minimize the harm of existing separations rules. That is why Qwest supports the Joint Board’s Recommended Decision to freeze Part 36 category relationships and jurisdictional allocations factors. By adopting the Joint Board’s recommendation to freeze Part 36 categories and factors, the Commission will be able to “buy the time” necessary to dramatically reform its existing separations rules and deregulate competitive services.

An integral part of any decision to freeze categories and factors should be a commitment to dramatically reform and simplify existing separations rules. These rules were first adopted in a monopolistic environment where rate of return regulation was the rule. Neither today’s telecommunications markets nor regulation bear much resemblance to such an environment. In reforming separations, the Commission should take its guidance from the Telecommunications

Act of 1996 which is focused on increasing competition and reducing unnecessary regulation.

Contrary to the suggestion of the Joint Board in its Recommended Decision, the Commission does not need to address separations impacts of unbundled network elements (“UNE”), digital subscriber line services, private lines or Internet traffic in the near future. A freeze of separations factors and existing methods is sufficient to deal with these issues until such time that the Commission radically reforms its separations rules or these services are deregulated. Addressing UNEs and these other issues separately will only divert the Commission from the task of designing a highly-simplified method for dealing with jurisdictional cost allocation and deregulating competitive services.

Qwest believes that many existing Part 36 studies would be rendered unnecessary with the adoption of a freeze and assumes that these studies will no longer be required by the Commission. Qwest acknowledges that nothing precludes state commissions from requiring carriers to provide certain intrastate data/cost studies, as the Joint Board notes in its Recommended Decision. However, states should not view this as an invitation to create more reporting/cost study requirements. To do so would deprive carriers of one of the primary benefits of a separations freeze -- reduced administrative burden.

Also, Qwest believes that it would be unwise to attempt to isolate the impact of Internet usage on dial equipment minutes (“DEM”) for jurisdictional separations purposes. While Qwest has experienced an increase in local DEM in recent years, it

does not have measurement capability in place to determine the share of total minutes of use which is represented by Internet usage. As a result, it cannot directly attribute the increase in local DEM to Internet usage or any other specific cause. The cost and administrative burden of measuring such traffic for separations purposes would far outweigh any potential benefits.

While Qwest believes that it would be inappropriate to attempt to attribute a specific portion of DEM to Internet usage and make a corresponding adjustment for purposes of a freeze, Qwest does not object to the use of the 95 percent default rate which appears to represent a compromise between the Commission and state regulators. This assumes, of course, that the Commission finds Internet usage to be interstate usage.

Both Smith v. Illinois Bell Telephone Co. and Section 221(c) provide the Commission with sufficient legal authority to adopt a freeze. The Court previously found that the Commission's decision to freeze jurisdictional cost assignments on subscriber lines (i.e., 25 percent interstate/75 percent intrastate) was consistent with Smith v. Illinois Bell Telephone Co. Therefore, it is highly likely that a Court would uphold any Commission decision freezing Part 36 categories and jurisdictional allocation factors.

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Qwest Corporation<sup>1</sup> (“Qwest”), through counsel and pursuant to the Federal Communications Commission’s (“Commission”) Public Notice,<sup>2</sup> hereby files its comments on the Federal-State Joint Board on Jurisdictional Separations’ (“Joint Board”) Recommended Decision that “until such time as comprehensive reform of jurisdictional separations can be implemented, the [Commission] should institute an interim freeze of the Part 36 category relationship and jurisdictional allocation factors.”<sup>3</sup>

I. **INTRODUCTION**

In the past Qwest has expressed its concern over the unnecessary complexity of the Commission’s rules for allocating the costs of jointly-used facilities between

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<sup>1</sup> On June 30, 2000, U S WEST, Inc., the parent and sole shareholder of U S WEST Communications, Inc., merged with and into Qwest Communications International Inc. Further, on July 6, 2000, U S WEST Communications, Inc. was renamed Qwest Corporation.

<sup>2</sup> See Public Notice, Comment Sought on Recommended Decision Issued by Federal-State Joint Board on Jurisdictional Separations, CC Docket No. 80-286, DA 00-1865, rel. Aug. 15, 2000 (“Public Notice”).

<sup>3</sup> In the Matter of Jurisdictional Separations Reform and Referral to the Federal-State Joint Board, CC Docket No. 80-286, Recommended Decision, FCC 00J-2, rel. July 21, 2000 at ¶ 1 (“Recommended Decision”).

jurisdictions.<sup>4</sup> In its earlier comments, Qwest observed that existing separations rules reflect policy compromises developed over the last six decades rather than cost causation.<sup>5</sup> These rules provide little information on the actual cost of providing service in today's increasingly competitive telecommunications market which is characterized by rapid changes in technology. Qwest pointed out that the problems with the Commission's separations rules could not be remedied by "tinkering." A major overhaul, if not abandonment, of existing rules is required.<sup>6</sup> Qwest's position remains unchanged.

Three years have passed since Qwest's earlier comments, and the Commission's separations rules remain unchanged. It is clear that dramatic separations reform will take longer than Qwest anticipated. It is also evident that an intermediate step is necessary to minimize the harm of existing jurisdictional cost allocation rules. That is why Qwest supports the Joint Board's Recommended Decision to freeze Part 36 category relationships and jurisdictional allocations factors. By adopting the Joint Board's recommendation to freeze Part 36 categories and factors, the Commission will be able to "buy the time" necessary to dramatically reform its existing separations rules and deregulate competitive services.<sup>7</sup>

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<sup>4</sup> See, generally, Comments of U S WEST, Inc., filed herein Dec. 10, 1997 ("Qwest Comments"); Reply Comments of U S WEST, Inc., filed herein Jan. 26, 1998 ("Qwest Reply Comments").

<sup>5</sup> See Qwest Reply Comments at 5.

<sup>6</sup> See Qwest Comments at 6.

<sup>7</sup> As more services are deregulated at both the state and federal levels, jurisdictional separations will become much less important. This is because costs of deregulated services will be removed pre-separations and the size of the cost pools subject to

An integral part of any decision to freeze categories and factors should be a commitment to dramatically reform and simplify existing separations rules. These rules were first adopted in a monopoly environment where rate of return regulation was the rule. Neither today's telecommunications markets nor regulation bear much resemblance to such an environment. In reforming separations, the Commission should take its guidance from the Telecommunications Act of 1996 ("1996 Act") which is focused on increasing competition and reducing unnecessary regulation. There is no doubt that the Commission has sufficient legal authority to modify its separations rules so that they encourage, rather than impede, competition in today's telecommunications markets.

As competition increases in local exchange markets and more services become deregulated, jurisdictional separations should become much less important. If this occurs at a rapid enough rate, the Commission may not be required to take any further action than to allow the interim freeze to become a permanent freeze. While new services and technologies are being introduced on a regular basis, there is no reason to believe that these changes will or should have a dramatic impact on separations.<sup>8</sup> Trying to fine tune existing separations rules to reflect rapid changes in telecommunications markets and technology is likely to be a futile task and not one that this Commission should embark on. Furthermore, the regulatory lag

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separations will shrink accordingly. Thus, while cost allocation will continue to play an important role due to the need to remove the costs of unregulated products and services, separations will become much less important.

associated with separations changes can be quite extreme given the multiple jurisdictions and the large number of interested industry participants.

The only workable solution is the adoption of a very simple set of separations rules. In the alternative, if after deliberation the Commission and the Joint Board are unable to radically reform existing separations rules within the five-year interim freeze period then the Commission should permanently freeze Part 36 categories and factors.

In the comments which follow, Qwest addresses specific issues raised in the Joint Board's Recommended Decision and the Commission's Public Notice.

## II. THE COMMISSION SHOULD DEVOTE ITS RESOURCES TO RADICALLY ALTERING OR ELIMINATING EXISTING SEPARATIONS RULES DURING THE PENDENCY OF ANY FREEZE

Qwest supports the Joint Board's proposal for a five-year freeze and the adoption of a permanent freeze if the Commission is unable to radically alter existing separations rules (e.g., similar to Qwest's proposal in its earlier comments<sup>9</sup>) by the end of the five-year period.<sup>10</sup> Qwest sees little, if any, benefit in evaluating and seeking comment on the impact of the freeze after two years as the Joint Board suggests. There is no doubt that a freeze will have impacts -- but there is no benefit in trying to compare the results of a freeze against what might have been under the

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<sup>8</sup> See Ex Parte letter from Porter E. Childers, Executive Director, United States Telecom Association, to Magalie Roman Salas, Federal Communications Commission, CC Docket No. 80-286, filed Feb. 11, 2000.

<sup>9</sup> See Qwest Comments at 11-13.

<sup>10</sup> The effective date of the freeze should be January 1, 2001. Price cap carriers should freeze their study area-specific separations allocation factors at annual levels for the period ending December 31, 2000.

Commission's existing outdated separations rules.<sup>11</sup> These rules provide a poor benchmark from which to measure change. The Commission's resources should be devoted to designing a set of very simplified streamlined separations rules which minimize both the amount of regulation and the administrative burden on all parties. If the Commission and the Joint Board are unable to develop such rules within five years, the Commission should make its interim freeze permanent to remove unnecessary uncertainty and to provide stability for the states and affected carriers.

The Commission does not need to address separations impacts of unbundled network elements ("UNE"), digital subscriber line ("DSL") services, private lines or Internet traffic in the near future, as the Joint Board suggests.<sup>12</sup> No action is needed on any of the issues identified in the Recommended Decision. For example, UNE revenue is currently booked in Account 5240 -- Rent Revenue -- and allocated in the separations process along with the underlying asset infrastructure used to provide those UNEs in the respective Telecommunications Plant in Account 2001. This methodology effectively matches revenues with the appropriate costs in each jurisdiction and, therefore, does not inappropriately distort income in either the state or interstate jurisdiction (i.e., it has an income-neutral impact). This methodology will be unaffected by the Joint Board's proposed freeze since UNE

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<sup>11</sup> In fact, the Commission should dismiss the proposed two-year evaluation as a purely hypothetical exercise that serves no practical purpose.

<sup>12</sup> See Recommended Decision at ¶ 27.

revenues and costs are associated with assets which are currently subject to separations, and usage patterns are expected to remain unchanged.

Addressing UNEs and the other aforementioned issues separately is the equivalent of tinkering with existing separations rules and will only divert the Commission from the task of designing a highly-simplified method for dealing with jurisdictional cost allocation and deregulating competitive services. A prime candidate for deregulation is DSL service which faces formidable competition both from similar services of other telecommunications service providers and from cable modem service (e.g., Roadrunner, Excite@Home, etc.).<sup>13</sup> Thus, a freeze of separations factors and existing methods is sufficient to deal with these issues until such time that the Commission radically reforms its separations rules or these services are deregulated.

### III. THE IMPOSITION OF ANY ADDITIONAL REPORTING/STUDY REQUIREMENTS WOULD DIMINISH THE BENEFITS OF A SEPARATIONS FREEZE

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One of the primary benefits of a separations freeze to carriers is a reduction in the administrative burden associated with the current separations process. This benefit could easily disappear if the Commission continues to require superfluous separations reports or if states require additional data submissions and cost studies in a post-freeze environment.<sup>14</sup>

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<sup>13</sup> Clearly, deregulating competitive services such as DSL would reduce the importance of jurisdictional separations by reducing the amount of costs subject to separations.

<sup>14</sup> The Joint Board recommends that all carriers continue to report separations results under current rules. Qwest disagrees. Continuing such reports would

While Section 221(c)<sup>15</sup> authorizes the Commission to classify carrier property and determine the portion of this property that is used in the provision of interstate or foreign telephone service, this section of the 1996 Act does not preclude state commissions from gathering information on the intrastate portion of costs. However, states do not have the authority to negate a separations freeze or to require Part 36 cost studies which determine federal/state jurisdictional allocations.<sup>16</sup> Qwest believes that many existing Part 36 studies would be rendered unnecessary with the adoption of a freeze and assumes that these studies will no longer be required by the Commission.

Qwest acknowledges that nothing precludes state commissions from requiring carriers to provide certain intrastate data/cost studies, as the Joint Board notes in its Recommended Decision.<sup>17</sup> However, states should not view this as an invitation to create more reporting/cost study requirements. To do so would deprive

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deprive local exchange carriers (“LEC”) of one of the primary benefits of a freeze -- reduced administrative burden. As part of this separations freeze proceeding, the Commission should review ARMIS requirements and remove ARMIS rows that request current traffic data. Provision of current usage data would serve only to confuse matters because this data will no longer be used to derive Part 36 factors. Therefore, the Commission should review the ARMIS 43-04 report and remove all lines that request current standard work seconds from operator work time data, subscriber line minutes of use (“MOU”), dial equipment MOU, conversation minutes, or any other data that does not support the frozen factors. The Commission should also review the ARMIS 43-08 report, Table IV, and eliminate the network usage study filed annually with the National Carrier Exchange Association.

<sup>15</sup> See 47 U.S.C. § 221(c).

<sup>16</sup> The Commission should clarify this point in any order freezing Part 36 categories and factors.

<sup>17</sup> See Recommended Decision at ¶ 19.

carriers of one of the primary benefits of a separations freeze -- reduced administrative burden. In considering any such reporting/cost study requirements, state commissions should limit their inquiry to information that is critical for them to perform their statutory duties within their respective states.

IV. DEM FACTORS SHOULD BE FROZEN AT CURRENT LEVELS OR, IN THE ALTERNATIVE, 95 PERCENT OF CURRENT LEVELS

In its Recommended Decision, the Joint Board observed that local dial equipment minutes (“DEM”) had been growing in recent years and opined that the cause might be due to increased Internet usage, among other things (including impacts of the 1996 Act and changes in technology). The Joint Board went on to “[recommend] that, if the Commission finds that Internet traffic is interstate [in the Reciprocal Compensation Remand proceeding], the Commission freeze the local DEM factor for the duration of the freeze at some substantial portion of the current year level . . .”<sup>18</sup> While the Joint Board acknowledges that there is no record to support how much DEM should be reduced for the purposes of a freeze, it suggests that, as a default estimate, DEM be frozen at 95 percent of current year levels. The Joint Board provides no basis for this default level other than its belief that Internet usage is responsible for increased local DEM in recent years.

While Qwest has experienced an increase in local DEM in recent years, it does not have measurement capability in place to determine the share of total MOU which is represented by Internet usage. As a result, it cannot directly attribute the increase in local DEM to Internet usage or any other specific cause. The cost and

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<sup>18</sup> See id. at ¶ 29.

administrative burden of measuring such traffic for separations purposes would far outweigh any potential benefits.

The simplest way of determining DEM associated with Internet use would be to require Internet service providers to report usage.<sup>19</sup> An alternative way of measuring Internet usage -- which Qwest opposes -- would be to require incumbent LECs to record all local calls in their central offices. Qwest does not currently do this because it has very little measured local service. In order to record all local calls Qwest would have to upgrade its central offices including adding AMA equipment, teleprocessing equipment, software upgrades, and computer storage capacity among other things. Qwest estimates that the expense of upgrading its central offices to record local calls would be quite significant.<sup>20</sup>

Similarly, Qwest cannot identify what portion of local DEM increases have been due to changes in telecommunications markets as a result of the 1996 Act. As such, Qwest believes that it would be unwise to attempt to isolate the impact of Internet usage on DEM for jurisdictional separations purposes.<sup>21</sup>

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<sup>19</sup> As the Commission is aware from the Reciprocal Compensation proceeding, Internet service providers ("ISP") are often served by competitive LECs and incumbent LECs can only estimate ISP traffic volumes by tracking and investigating telephone numbers with long holding times. Clearly, the most accurate and complete method of determining Internet usage would be to go to the source, the ISPs themselves.

<sup>20</sup> SBC Communications, Inc. ("SBC") indicated that it spent \$10 million in 1998 alone to deploy equipment to measure Internet traffic. See Ex Parte letter from Jay Bennett, SBC, to Magalie Roman Salas, Federal Communications Commission, CC Docket No. 99-68, filed May 21, 1999 at Attachment 1.

<sup>21</sup> Even if a LEC has mechanisms in place which could measure Internet usage today, it doesn't necessarily follow that it would be appropriate to freeze DEM on

While Qwest believes that it would be inappropriate to attempt to attribute a specific portion of DEM to Internet usage and make a corresponding adjustment for purposes of a freeze, Qwest does not object to the use of the 95 percent default rate which appears to represent a compromise between the Commission and state regulators. This assumes, of course, that the Commission finds that Internet usage is interstate usage and that it is appropriate to arbitrarily adjust the DEM factor. Qwest agrees with the Joint Board's position that once factors and categories are frozen, there should be few, if any, adjustments until the Commission dramatically reforms its separations rules.<sup>22</sup>

V. NEITHER SMITH v. ILLINOIS BELL TELEPHONE CO. NOR SECTION 221(c) OF THE 1996 ACT PROHIBIT THE COMMISSION FROM FREEZING PART 36 ALLOCATION FACTORS AND CATEGORY RELATIONSHIPS

Smith v. Illinois Bell Telephone Co.<sup>23</sup> is the legal precedent which laid the foundation for the interstate/intrastate separations process as we know it today. In Smith v. Illinois Bell Telephone Co., the Court held that property, revenues and expenses had to be separated or apportioned between interstate and intrastate jurisdictions.<sup>24</sup> While the Court did not find that apportionment had to be exact, "it is quite another matter to ignore altogether the actual uses to which the property is

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the basis of this data. The reason being that Internet usage is rapidly migrating from dial-up access to emerging technologies such as DSL.

<sup>22</sup> See Recommended Decision at ¶ 32.

<sup>23</sup> 282 U.S. 133 (1930).

<sup>24</sup> See id. at 148-151.

put,”<sup>25</sup> as was the case in Smith v. Illinois Bell Telephone Co. The Court found that the validity of an intrastate rate could not be determined without “an appropriate determination of the value of the property employed in the intrastate business and of the compensation receivable for the intrastate service under the rates prescribed.”<sup>26</sup> Nowhere in Smith v. Illinois Bell Telephone Co. did the Court require the use of a specific separations methodology, nor did it require the Interstate Commerce Commission, the Commission’s predecessor, or any other authority to prescribe jurisdictional separations.

Qwest believes that Smith v. Illinois Bell Telephone Co. basically stands for the proposition that there must be some sort of “jurisdictional symmetry” between revenues and costs. The case provides no insight into the question of where intrastate costs end and interstate costs begin, or vice versa. The Court simply found that it is impossible to determine whether a rate is confiscatory if certain costs associated with providing the service are ignored.

Qwest believes that “jurisdictional symmetry” between costs and revenues can be achieved (and the requirements of Smith v. Illinois Bell Telephone Co. satisfied) in a number of different ways. One way is the Commission’s traditional approach to separations which evolved in an environment where AT&T Long Lines was the predominate provider of interstate long distance service and its affiliates, the local Bell Operating Companies (“BOC”), were the predominate providers of intrastate service. This approach to separations was end-to-end (or station-to-

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<sup>25</sup> Id. at 151.

station) and very burdensome. Costs of virtually every class of commonly used plant were allocated between jurisdictions on the basis of a variety of factors including relative use, direct assignment, and fixed factors among others. Despite the level of detail inherent in this approach, the results were “less than scientific,” and were more often the product of political compromises than reflective of the cost characteristics of telephone plant.

The 1996 Act does not limit the Commission in determining where an interstate call begins or ends or which facilities are identified as being used in the provision of interstate service. In fact, as the Commission observed in the past, Section 221(c) gives the Commission the authority to determine what property of a carrier is considered to be used in interstate service.<sup>27</sup>

Both Smith v. Illinois Bell Telephone Co. and Section 221(c) provide the Commission with sufficient legal authority to adopt a freeze. The Court previously found that the Commission’s decision to freeze jurisdictional cost assignments on subscriber lines (i.e., 25 percent interstate/75 percent intrastate) was consistent with Smith v. Illinois Bell Telephone Co.<sup>28</sup> Furthermore, the Commission has not encountered any legal impediments to the use of direct assignment for mixed-use

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<sup>26</sup> Id. at 149 citing Minnesota Rate Cases, 230 U.S. 352, 435, 33 S.Ct. 729 (1913).

<sup>27</sup> See In the Matter of Jurisdictional Separations Reform and Referral to the Federal-State Joint Board, Notice of Proposed Rulemaking, 12 FCC Rcd. 22120, 22137 ¶ 35 (1997); see also 47 U.S.C. § 221(c).

<sup>28</sup> See MCI Telecommunications Corp. v. FCC, 750 F.2d 135, 141-42 (D.C. Cir. 1984). See also Rural Telephone Coalition v. FCC, 838 F.2d 1307, 1314-15 (D.C. Cir. 1988).

facilities.<sup>29</sup> Thus, it is highly likely that a Court would affirm, if challenged, any Commission decision adopting rules which froze Part 36 categories and jurisdictional allocation factors.

## VI. CONCLUSION

For the forgoing reasons, the Commission should adopt rules to freeze Part 36 categories and factors.

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<sup>29</sup> In its Mixed Use Decision the Commission revised its separation rules to directly assign the costs of mixed-use special access lines to the interstate jurisdiction if 10 percent or more of the traffic was interstate. See In the Matter of MTS and WATS Market Structure Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, Decision and Order, 4 FCC Rcd. 5660 (1989).

## CERTIFICATE OF SERVICE

I, Kristi Jones, do hereby certify that I have caused 1) the foregoing **COMMENTS OF QWEST CORPORATION** to be filed electronically with the FCC by using its Electronic Comment Filing System, 2) a copy of the **COMMENTS** to be served, via hand delivery, upon the persons/entity listed on the attached service list (marked with a number sign), 3) a courtesy copy of the **COMMENTS** to be served, via hand delivery, upon the persons listed in the attached service list (marked with an asterisk), and 4) a copy of the **COMMENTS** to be served, via first-class United States mail, postage prepaid, upon all other persons listed on the attached service list.

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